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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re Case No. BK-S-18-12456-GS

DESERT OASIS APARTMENTS, LLC, Chapter 11

Debtor. Hearing Date: Nov. 18, 2021

Hearing Time: 1:30 p.m.

**BUSBIN'S OPPOSITION TO APPLICATION FOR APPROVAL AND PAYMENT  
OF ATTORNEYS FEES FROM SALE PROCEEDS TO SECURED CREDITOR  
THE NORTHERN TRUST COMPANY**

Millions of dollars in cash in a bankruptcy estate is too great a temptation for the Northern Trust Company. Not satisfied with getting all of its principal, interest, default interest and late charges, plus its attorneys fees and costs, paid by the Desert Oasis Apartments, LLC bankruptcy estate in 2020, Northern Trust eyes the remaining millions and sees an opportunity to continue to plunder the estate with grossly inflated demands for attorneys fees.

1 But Northern Trust has already been paid in full on its Notes and there is no legal  
2 basis for recovering further attorneys fees under 11 U.S.C. § 506.

3  
4 And even if fees were recoverable, those requested fees are unreasonable in nature  
5 and amount. Far too much time was charged by experienced attorneys to complete  
6 simple tasks. Charges were duplicated. Fees were charged for services that are not  
7 compensable. Descriptions of services lack the basic information needed to determine if  
8 they are compensable. Further, fees were previously requested and paid for the title  
9 company's defense attorney, which were discovered to have been paid directly by the  
10 title company, with no legal obligation of Northern Trust to pay the title company  
11 defense attorney. The estate deserves a credit for that payment.  
12

13  
14 Accordingly, Northern Trust's motion for fees [ECF No. 403] fails to meet the  
15 requisites of 11 U.S.C. § 506 and Brad Busbin, Trustee of the Gonzales Charitable  
16 Remainder Unitrust One ("Busbin") opposes the motion and requests that if any fees are  
17 awarded, they be reduced to a reasonable figure.  
18

19  
20 **I**

21 **NORTHERN TRUST'S CURRENT FEE APPLICATION CONTINUES A**  
22 **PATTERN OF OVERCHARGING THE DESERT APARTMENTS ESTATE,**  
23 **INCLUDING CHARGING FOR FEES OF DEFENSE COUNSEL THAT WERE**  
**NOT AN OBLIGATION OF NORTHERN TRUST**

24 Northern Trust knows it is overcharging. Soon after filing its first motion for  
25 payment of attorneys fees on July 20, 2020 [ECF No. 1368 in Case No. 18-12454],  
26 Northern Trust readily stipulated with Chapter 11 Trustee Kavita Gupta to reduce its  
27 attorney fee demand by \$90,000 [ECF No. 118, p. 2]. Because the amount claimed was  
28

1 \$547,693.56, Northern Trust voluntarily sliced 16.4% off the top of its demand without a  
2 fight. *Id.* The stipulation reflects two circumstances: (1) Northern Trust's attorneys  
3 grossly overcharge, and (2) fee reductions are in order. This Opposition will show that  
4 with the current motion, Northern Trust continues its practice of spectacular  
5 overcharging.  
6

7  
8 A gross example of Northern Trust's practice of overcharging is the fees of  
9 Gerrard Cox Larson ("Gerrard"). After Northern Trust and Gerrard evaded questions  
10 about their engagement for months, it was determined that Gerrard was engaged by First  
11 American Title Insurance Company ("First American") to defend the adversary case in  
12 which Northern Trust is a defendant [Case No. 19-01108] under First American's Loan  
13 Policy of Title Insurance ("title policy") that requires First American to defend "**at its**  
14 **own cost.**" *Wray Decl., Ex. 1, ¶ 5(a)*(emphasis added). First American – which is not  
15 even a creditor of this estate -- is the obligor for Gerrard's fees. Northern Trust is billed  
16 nothing and pays nothing toward Gerrard's fees. *Wray Decl., Ex's 2 & 3.* Yet in the first  
17 motion for fees filed July 20, 2020, Northern Trust sought and obtained payment of  
18 \$64,029.34 from the estate to reimburse First American for fees that **First American** paid  
19 to Gerrard. *See ECF No. 128; Wray Decl., Ex. 's 2 & 3.*  
20  
21

22  
23 To justify payment where Northern Trust never had any obligation to pay for  
24 defense counsel, Gerrard and First American argue that as an oversecured creditor,  
25 Northern Trust is entitled under 11 U.S.C. § 506 to recovery of its fees, and since First  
26 American is contractually subrogated to Northern Trust's position, Northern Trust can  
27 recover fees paid by First American. *Wray Decl., Ex's 2 & 3.* This argument is specious.  
28



1 The title policy states that a right of subrogation is only triggered when First  
 2 American has “settled and paid a claim under this policy.” *Wray Decl., Ex. 1, ¶ 12. First*  
 3 *American has neither settled nor paid a claim in this case. Wray Decl.* Purely as a  
 4 matter of contract law, therefore, First American is not subrogated to any alleged “rights”  
 5 of Northern Trust.<sup>1</sup> *Id.*

7 Accordingly, First American is not a creditor of the Desert Apartments estate and  
 8 the estate does not owe First American or Gerrard anything. Additionally, Gerrard  
 9 represents both Northern Trust and the Shotgun Entities<sup>2</sup> in the adversary proceeding.  
 10 But the Shotgun Entities are creditors only in the Desert Land, LLC case [Case No. 18-  
 11 12454]. Therefore, even if subrogation existed, which it does not, no more than half of  
 12 Gerrard’s fees (the half attributable to Northern Trust) could properly be charged to the  
 13 Desert Apartments estate. The simple fact is that Northern Trust, First American and  
 14 Gerrard went after the entire Gerrard billing of \$64,029.34<sup>3</sup> from the Desert Apartments  
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21 <sup>1</sup> Hypothetically, even if First American were eventually called upon to pay the claim, so  
 22 as to make Northern Trust whole and thereby trigger a right of subrogation, ***the payment***  
 23 ***of the claim would mean that Mr. Busbin had prevailed in the adversary case and***  
 24 ***established his right to priority ahead of Northern Trust.*** In that event, Mr. Busbin  
 25 would be entitled to first priority to the proceeds of the sale of the apartments property.  
 26 First American would be a junior lienholder only entitled to payment after Mr. Busbin  
 27 was paid in full. Because there would not be sufficient proceeds left after payment of Mr.  
 28 Busbin to pay First American in full, First American as subrogee of Northern Trust  
 would not be able to claim the status of an oversecured creditor, and thus could not  
 recover any attorneys fees from the Desert Apartments estate under 11 U.S.C. § 506.

<sup>2</sup> The “Shotgun Entities” are Shotgun Creek Investments, LLC, Shotgun Creek Las Vegas, LLC and Shotgun Investments Nevada, LLC.

<sup>3</sup> Gerrard had already been paid this sum by First American.



1 estate in 2020 because the Desert Apartments estate has cash and Desert Land doesn't,  
 2 when Northern Trust had no legal right to do so.

## 3 II

### 4 FACTS

#### 5 A. Northern Trust's Counsel Overbills to Reply to a Charge of 6 Overbilling

7 Trustee Gupta planned to object to Northern Trust's attorneys fees demand  
 8 contained in its motion to disburse filed July 20, 2020 [ECF No. 1368 in Case No. 18-  
 9 12454] until Northern Trust stipulated with Trustee Gupta to reduce its billing by  
 10 \$90,000. [ECF No. 1407 in Case No. 18-12454].  
 11

12 Mr. Busbin's *five-paragraph* response to the fees request [ECF No. 1436 in Case  
 13 No. 18-12454] filed August 14, 2020 concurred with the \$90,000 reduction. Any  
 14 attorney, let alone experienced bankruptcy attorneys familiar with the subject matter,  
 15 would have digested this response in a couple of minutes. Yet on August 14, 2020, Ms.  
 16 Reese recorded these entries:  
 17

#### 18 **Receipt and review Response filed by Gonzales Trust to fees 19 (1.7), draft email to client (.3), outline issues for reply (.8)**

20 As Ms. Reese billed \$1,054 (1.7 hours at her hourly rate of \$620) to read the 5-  
 21 paragraph response, and .8 more hours to allegedly "outline" the alleged "issues,"  
 22 attorney Anthony Austin was billing 1.2 hours to "begin work on shell of response to fee  
 23 objections." This was followed on August 16, 2020 by Ms. Reese billing .7 hours to  
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 25  
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 28

1 “review objection and work on reply” and another .7 hours to “review declarations<sup>4</sup> for  
 2 reply.” Then on August 17, 2020, Mr. Austin billed .5 hours to “work on reply regarding  
 3 disbursement of funds” and Ms. Reece charged 1.7 more hours to “edit reply.” Thus, the  
 4 two lawyers charged *at least 8.6 hours*<sup>5</sup> to read and “reply” to Mr. Busbin’s 5-paragraph  
 5 concurrence with the stipulated resolution of the motion.  
 6

7  
 8 Ironically, Northern Trust lawyers massively padded a billing to read a short filing  
 9 concurring that Northern Trust’s lawyers had in fact padded their bills.

10 **B. Overbilling to Read a Notice of Withdrawal of a Disclosure Statement**

11 In 2018, co-debtor SkyVue Las Vegas, LLC filed a disclosure statement and plan  
 12 that never went anywhere. Two years later, on July 2, 2020, SkyVue filed *a one-*  
 13 *sentence withdrawal* of the motion to approve the disclosure statement and plan. [ECF  
 14 No. 164 in Case No. 12458]. On July 2, 2020, Ms. Reece billed .7 hours -- \$434 -- to  
 15 read that sentence. Specifically, she billed .7 to “review withdrawal of disclosure  
 16 statement.” She separately billed .7 hours for emails with unnamed parties on the same  
 17 date supposedly concerning whether the disclosure statement hearing was continued. On  
 18 July 3, 2020, Mr. Austin billed .3 hours to read the same one-sentence withdrawal “and  
 19 correspond with Ms. Reece regarding” it. These are frivolous overcharges that should be  
 20 entirely rejected.  
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 22  
 23  
 24

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25 <sup>4</sup> The reply contained no declarations when it was filed. *See ECF No. 118*, filed 8/17/20.

26 <sup>5</sup> Interspersed in the billings are charges for emails and correspondence between attorneys  
 27 Reece, Austin and Hawkins. The descriptions are minimalist, and there are key  
 28 redactions, but given their proximity to the entries concerning the reply, these emails and  
 other communications likely could be charged to the reply, resulting in *more than 8.6*  
 hours’ worth of charges.

1           **C. Overcharging to Read the Order Granting a Rule 54(b) Motion**

2           On July 1, 2020 the Court issued an 11-page order and 2-page judgment granting  
3 Northern Trust's Rule 54(b) motion in Adv. No. 19-01108. On July 1, 2020, Mr. Austin  
4 recorded that he allegedly spent .7 hours on "attention to" the order and judgment and .1  
5 hours emailing Ms. Reece about it. On July 1, 2020, Ms. Reece charged 1.2 hours for  
6 "review and analysis" of the same order, resulting in a total duplicative billing of 1.9  
7 hours to read a ruling on a motion whose facts, issues and law were intimately familiar to  
8 counsel. For good measure, Ms. Reece billed .8 more hours allegedly to email the client  
9 about the order. To be generous, to read the ruling and email a status report to the client  
10 could have taken at most a half hour. The billing of 2.8 hours (\$1,560) is absurd.

14           **D. Overcharging to "Prepare for Hearings" on a Motion**

15           Northern Trust's motion to disburse funds required two hearings: one on August  
16 6, 2020 and one on August 18, 2020. Mr. Busbin had asked Northern Trust to set the  
17 motion for hearing on a date after the District Court ruled on Mr. Busbin's motion for a  
18 stay pending appeal in the adversary case. Northern Trust insisted on proceeding by  
19 order shortening time on August 6, 2020. *Wray Decl., filed herewith.* At the hearing, the  
20 Court determined it should not make a ruling on the disbursement motion until after the  
21 District Court ruled on the stay motion, and so the hearing was continued until August  
22 18<sup>th</sup>.

23           Ms. Reece billed 1.0 hours on August 5, 2020 to "prepare for argument" and  
24 another 2.7 hours on August 6<sup>th</sup> allegedly to "prepare for the hearings." Her alleged  
25 "preparation" time of 3.7 hours is suspicious because she had quite recently prepared the  
26  
27  
28



1 motion (it was heard on shortened time) and she had billed an extraordinary number of  
2 hours on the motion already, so the arguments were obviously still fresh in her mind.

3  
4 Be that as it may, the District Court denied Mr. Busbin's motion for stay and the  
5 hearing on the motion to disburse proceeded on August 18<sup>th</sup>. Due to denial of a stay, it  
6 was a foregone conclusion that the motion to disburse would be granted. Yet on August  
7 17<sup>th</sup> Ms. Reece billed .8 hours to "prepare for hearing." She then billed another 3.8 hours  
8 on August 18, 2020 to "prepare for and attend" the hearing. The Trustee's counsel,  
9 Kevin Coleman billed .7 hours to attend the hearing, *Wray Decl, filed herewith*, so the  
10 hearing only lasted 42 minutes. Ms. Reece thus claims to have spent 3.9 hours to  
11 "prepare for" argument a second time on a motion the Court was going to grant, after  
12 having billed 3.7 hours 12 days earlier allegedly to "prepare for" the argument. The  
13 claim that she spent 3.7 hours and then 3.9 hours more to "prepare for" the argument 12  
14 days apart is preposterous. Even if she had actually "prepared" for 7.6 hours, this amount  
15 of time to "prepare" would have been grossly unreasonable.  
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17  
18

19 **E. Overbilling to Prepare a Payoff Demand**

20 Northern Trust is a financial institution. It is has people whose job it is to keep  
21 track of what it is owed and produce payoff demands.  
22

23 At the first hearing on Northern Trust's motion for disbursement, on August 6,  
24 2020, the Court directed Northern Trust to provide the other parties and file with the  
25 court a payoff demand on its two notes and deeds of trust.  
26

27 While the descriptions are vague and there is a redacted portion, from August 6-  
28 11, 2020, Ms. Reece recorded having spent at least 5.8 hours to allegedly produce a

1 “schedule” of the debt allegedly owed to Northern Trust. After all that billing by Ms.  
 2 Reece, on August 11, 2020 Mr. Austin billed .5 hours to “work on filing related to  
 3 schedule of debt owed *and prepare schedule*” (emphasis added). Ms. Reece then  
 4 recorded an additional 1.6 hours to allegedly “edit notice of filing and work on schedule,”  
 5 bringing the total of her time alone to produce a payoff demand to 7.4 hours. In total,  
 6 Northern Trust charged the obscene amount of \$5,102 in attorneys fees for a payoff  
 7 demand that Northern Trust should have produced without incurring hardly any fees.  
 8

9  
 10 On August 11, 2020, Northern Trust filed a two-sentence notice with a very basic,  
 11 one-page spreadsheet of principal, interest, and default interest owed, plus the amount  
 12 claimed to be owed for attorneys fees (ECF No.1427 in Case No. 18-14524). This  
 13 information was “prepared” into notice and spreadsheet form by Mr. Austin in half an  
 14 hour. Ms. Reece’s billing (7.4 hours X \$620 = \$4,588) is totally ridiculous.  
 15  
 16

17 **F. Overcharging for the Hearing on the Break-Up Fee Motion**

18 On August 12, 2020, Ms. Reece recorded:

19 **Review and respond to emails about hearing on breakup fees**  
 20 **(.8), draft email and review response about language for order and**  
 21 **concern (.6), draft email to client about [redacted] (.4)**

22 Trustee Gupta’s counsel Kim Fineman and Kevin Coleman did exchange emails  
 23 with Ms. Reece on August 12, 2020 about the hearing on the motion to approve the  
 24 break-up fee, which was set for the next day. The emails took very little time. Mr.  
 25 Coleman did not even bill for it and Ms. Fineman billed .2. *Wray Decl., Ex. 5.* Ms.  
 26 Reece charging .8 hours is excessive.  
 27  
 28

Then on August 13, 2020, Ms. Reece recorded:

1                   **Prepare for and attend hearing on breakup fee (1.8), review and**  
 2                   **approve form of order (.4), draft email to trustee's attorney (.2), draft**  
 3                   **memo about [redacted] (.8)**

4                   Ms. Fineman billed .4 hours on August 13, 2020 to prepare for and attend the  
 5                   hearing on the breakup fee, *and it was her motion. Wray Decl., Ex. 4.* Ms. Reece could  
 6                   not honestly bill 1.8 hours to prepare for and attend this hearing.

7  
 8                   **G. Time Sheet Entries Lack Sufficient Descriptions to be Compensable**

9                   Ms. Reece's time entries on September 4, 2020 look like this:

10                   **Review and draft emails to client about [redacted] (1.6),**  
 11                   **conference call with client (.8), draft emails to client about [redacted]**  
 12                   **(.8), review and respond to email from client about [redacted] (.6)**

13                   These entries total 3.8 hours and \$2,356 but the descriptions reveal absolutely  
 14                   nothing about how the services allegedly rendered should be compensable. It would not  
 15                   reveal a confidential communication to disclose what the general subject matter of the  
 16                   services is, such as, a particular pending motion or issue. Furthermore, Northern Trust  
 17                   has the burden to disclose sufficient information to enable the Mr. Busbin to ascertain if  
 18                   the services are compensable. The purported descriptions of services on September 4,  
 19                   2020 with the redactions are tantamount to no descriptions at all and they are completely  
 20                   inadequate for the purpose of determining reasonableness under 11 U.S.C. § 506. The  
 21                   Court may be able to see in its unredacted versions of the billings the information that  
 22                   was redacted from the version provided to Mr. Busbin. Mr. Busbin strongly suspects that  
 23                   the redacted information does not contain any attorney-client communications. Having  
 24                   redacted or simply failed to include the non-confidential information necessary for Mr.  
 25  
 26  
 27  
 28



Busbin to determine whether the fees are reasonable, Northern Trust should be deemed to have waived any claim it has to recover the amount of those fees.

The following are time entries that should not be compensable because non-confidential information necessary for Mr. Busbin to determine reasonableness is missing or redacted. The following does not list all the entries whose descriptions are lacking. The list only includes those entries where it was impossible to determine from the context of *other surrounding entries* or from *filings with the court* how the services allegedly rendered could be compensable:

7/24/20	Anthony Austin	Telephone to Ms. Reece regarding [redacted]	.6
		Attention to correspondence from Ms. Reece and respond regarding same	.2
7/27/20	Anthony Austin	Telephone from Ms. Reece regarding [redacted]	.7
7/27/20	Cathy Reece	Long telephone call with client about [redacted]	.6
		Long telephone call with D. Gerrard about [redacted]	.8
7/28/20	Cathy Reece	Long telephone call with D. Gerrard and Associate about [redacted]	.8
7/29/20	Mark Hawkins	Review [redacted]	.4
8/10/20	Cathy Reece	Review [redacted]	1.0
8/13/20	Cathy Reece	Draft memo about [redacted]	.8
8/17/20	Cathy Reece	Review and respond to emails to and from client	.4
		Emails about [redacted]	.3

1				
2			Draft letter to title company	.8
3			Telephone call with M Hawkins about	
4			[redacted]	.4
5			Draft email to in-house counsel	.2
6	8/17/20	Mark Hawkins	Analyze [redacted]	.4
7				
8	8/18/20	Don Miner	Conference regarding [redacted]	.6
9	8/21/20	Cathy Reece	Receipt and review email from title company	
10			About [redacted]	.6
11	8/27/20	Cathy Reece	Call with D. Gerrard	.4
12				
13	9/3/20	Cathy Reece	Analysis of [redacted]	.8
14			Draft email to client and response about	
15			[redacted]	.5
16	9/4/20	Cathy Reece	Review and draft emails to client about	
17			[redacted]	1.6
18			Conference call with client	.8
19			Draft emails to client about [redacted]	.8
20				
21			Review and respond to email from client	
22			about [redacted]	.6
23	9/24/20	Mark Hawkins	Confer with C. Reece regarding [redacted]	.4
24	9/30/20	Cathy Reece	Review and respond to email from client	.2
25			Draft email to client about [redacted]	.4
26				
27	10/6/20	Anthony Austin	Participate in telephone conference with	
28			Counsel regarding [redacted]	.7
			Telephone from Ms. Reece regarding	

1			[redacted]	.5
2	10/6/20	Cathy Reece	Prepare for and attend long call about	
3			[redacted]	2.8
4	10/12/20	Anthony Austin	Correspond with Ms. Reece regarding	
5			[redacted]	.7
6	10/15/20	Anthony Austin	Telephone from Ms. Reece regarding	
7			[redacted]	.3
8	10/15/20	Cathy Reece	Conference call with client about [redacted]	.8
9	12/11/20	Cathy Reece	Draft and send email to client about [redacted]	.4
10	12/18/20	Cathy Reece	Conference call with D Gerrard about	
11			[redacted]	4.
12	2/2/21	Cathy Reece	Draft email to client about [redacted]	.4
13	2/5/21	Cathy Reece	Telephone call with client about [redacted]	.4
14			Send email to clients	.4
15	2/15/21	Cathy Reece	Review and respond to email and issues	.3
16	3/15/21	Anthony Austin	Prepare and attend teleconference with	
17			Reece regarding [redacted]	.5
18	3/25/21	Anthony Austin	Telephone from Ms. Reece regarding	
19			[redacted]	.4
20	3/26/21	Anthony Austin	Research [redacted]	1.3
21	3/30/21	Anthony Austin	Review research regarding [redacted]	1.1
22			Attention to correspondence from Ms.	
23			Reece regarding [redacted]	.1

In summary, the charges that should be disallowed due to lack of adequate descriptions of services are as follows:



Anthony Austin	7.1 hours	\$2,840
Cathy Reece	18.5 hours	\$11,470
Mark Hawkins	1.2 hours	\$480
Don Miner	.6 hours	\$348
TOTAL:		<b>\$15,138</b>

#### H. Overcharging for Emails Is Obvious from the Billings

In the experience of the undersigned over years of billing, the vast majority of emails are billed at .1 because they take a few minutes to read or to draft. A typical email to a client is a status report or request for information, and a typical email to another attorney is few sentences long. *Wray Decl., attached.* There are of course emails that are longer, but for the most part, reading an email that has been received is a .1 and drafting an email is a .1. *Id.*

A dramatic example is the billings of Trustee Kavita Gupta. In ECF No. 372-1, Trustee Gupta produced 117 pages of time entries covering the period of March 2019 through June 2021. During that period, per a count done by the undersigned's staff, Ms. Gupta recorded sending or receiving an email 2,888 times. Of that total, 33 emails were recorded at .2 or greater. All the rest were recorded as .1. So approximately 99% of Trustee Gupta's emails were .1's.

In contrast, of the 150 entries by Ms. Reece in the billings attached to the motion that mention either reviewing or composing an email, only 9 of those entries are for .1 hours:

1 7/17/20 - draft email to client (.1)

2 7/19/20 - draft emails to clients (.1)

3 7/21/20 - draft email (.1)

4 9/18/20 – draft email to client (.1)

5 10/13/20 – draft email to D Gerrard (.1)

6 11/23/20 - draft email to client (.1)

7 2/26/21 – draft email to D Gerrard (.1)

8 4/25/21 – Draft email to client with reply brief (.1)

9 4/25/21 - Draft email to D Gerrard with reply brief (.1)

10 While one reasonably expects a very high percentage of emails to be .1's, in the  
11 case of Ms. Reece, it is the opposite. In her case, 94% of her emails are recorded as .2 or  
12 more. The evidence supports a reasonable conclusion that Ms. Reece pads her billings  
13 for reviewing and sending emails. And when she pads, she does so with gusto. She does  
14 not simply go with a .2, she records a .4 in many cases. Each time that happens, Ms.  
15 Reece is inflating her billing a minimum of 100% up to 400% or more.

#### 16 **I. Doing the Same Work as Gerrard Should Not Be Compensable**

17 As shown above, the Gerrard firm was paid, and is being paid, by First American  
18 under a title policy to defend Adv. No. 19-01108, *Busbin v. Shotgun*, et al., but Northern  
19 Trust got all of Gerrard's fees reimbursed to First American as part of Northern Trust's  
20 motion to disburse in 2020.

21 Beginning on October 2, 2020, Northern Trust's attorneys at Fennemore began  
22 charging for services to defend Mr. Busbin's appeal to the District Court in the adversary  
23

1 proceeding. The vast majority of all time entries in October, 2020 relate to charges for  
 2 the appeal of the adversary case for which Gerrard is also billing the estate (35.7 hours  
 3 out of 49.20 total hours). To a lesser extent, the charges in November (2.5 hours) and  
 4 December (1.1) also relate to the appeal.  
 5

6 The estate should not be liable for paying both Gerrard's and Fennemore's bills  
 7 for the appeal. As shown above, Gerrard is not a creditor of the estate. Its fees should be  
 8 paid by First American. Paying Fennemore for charges related to the appeal that is being  
 9 handled by insurance defense counsel is an unnecessary and unreasonable duplication of  
 10 fees. It must be presumed that First American would engage counsel competent to  
 11 defend the adversary action by itself. All the fees requested for appeal charges in  
 12 October, November and December, 2020 should be rejected.  
 13  
 14

### 15 III

#### 16 ARGUMENT

#### 17 A. Northern Trust Has Failed to Establish the Requisites for Recovery of 18 Attorneys Fees and Costs under 11 U.S.C. § 506 19

20 Under 11 U.S.C. § 506(b):

21 To the extent that an allowed secured claim is secured by property the  
 22 value of which, after any recovery under subsection (c) of this section, is  
 23 greater than the amount of such claim, there shall be allowed to the holder of  
 24 such claim, interest on such claim, and any reasonable fees, costs, or charges  
 25 provided for under the agreement or State statute under which such claim  
 arose.

26 Thus, Northern Trust is entitled to attorneys fees under Section 506 only to the  
 27 extent that (1) the claim is an allowed secured claim; (2) Northern Trust is oversecured;  
 28 (3) the fees are reasonable; and (4) the fees are provided for under the agreement. *Kord*



1 *Enters. II v. Cal. Commerce Bank (In re Kord Enters. II)*, 139 F.3d 684, 686-87 (9th Cir.  
2 1998).

3  
4 Northern Trust contends that it holds an allowed, oversecured claim based on the  
5 Court's ruling in Adv. No. 19-01108, which is now on appeal. *Motion*, p. 2. Northern  
6 Trust also asserts that its security is the proceeds of sale of the apartments property, and  
7 that Northern Trust is oversecured "by virtue of the amount of the proceeds from the  
8 purchase price paid for the Apartment vis-à-vis Northern Trust's Claim." *Id.*, 2:25-27.

9  
10 Assuming *for purposes of discussion only* that Northern Trust has a security  
11 interest attaching to the remaining proceeds of sale, Northern Trust was paid in 2020 by  
12 the Desert Apartments estate for the full amount owed on its notes. Northern Trust now  
13 has no claim except the amount of attorneys fees that Northern Trust continues to charge  
14 in this bankruptcy case. As to whether those attorneys fees are "provided for under the  
15 agreement" as required by Bankruptcy Code § 506, Illinois law – the law applicable to  
16 the Notes -- requires that the attorney's fees clause be strictly construed. *Northbrook*  
17 *Bank & Trust v. Abbas*, 102 N.E.3d 861, 878 (Ill. App. 2018) ("We are required to  
18 strictly construe a contractual provision for attorney fees."). Northern Trust's moving  
19 papers rely upon language from the Notes which allows Northern Trust to recover the  
20 amount paid to "someone else to help collect this Note if Borrower does not pay." *See*  
21 *Motion*, p. 3:17-21. A plain reading of the Note language quoted at page 3 of the moving  
22 papers would be that "expenses for bankruptcy proceedings" are recoverable, but only to  
23 the extent those expenses are being paid to "someone else to help collect this Note."  
24  
25 Again, the Notes have already been collected. Thus, the attorneys fees that Northern  
26  
27  
28

1 Trust seeks to collect here are not being paid to “someone else to help collect this Note.”  
2 Applying the plain language of the Notes that Northern Trust relies upon, Northern Trust  
3 has failed to show that the fees it seeks to recover by way of the instant motion are  
4 “provided for under the agreement.” Consequently, the prerequisites for recovery of  
5 attorneys fees under Section 506 are not satisfied and the motion for fees should be  
6 denied on that basis.  
7  
8

9 **B. Even If Northern Trust Could Recover Fees and Costs under 11 U.S.C.**  
10 **§ 506, the Fees Must Be Limited to a Reasonable Amount**

11 Although Northern Trust is precluded by the language it quotes from its own  
12 Notes from recovering fees in the instant motion, the evidence set forth in the “Facts”  
13 section, above, shows that the fee request should be denied anyway because it is  
14 unreasonable.  
15

16 In *In re Dalessio*, 74 B.R. 721, 723 (B.A.P. 9th Cir. 1987), the court stated:

17  
18 Reasonableness embodies a range of human conduct. The key  
19 determinant is whether the creditor incurred expenses and fees that fall  
20 within the scope of the fees provision in the agreement, and took the kinds  
21 of actions that similarly situated creditors might reasonably conclude  
22 should be taken, or whether such actions and fees were so clearly outside  
23 the range as to be deemed unreasonable. The bankruptcy court should  
24 inquire whether, considering all relevant factors including duplication, the  
25 creditor reasonably believed that the services employed were necessary to  
26 protect his interests in the debtor's property. *In re Carey*, 8 B.R. 1000, 1004  
27 (Bankr. S.D. Cal. 1981).  
28

29 In *Dalessio*, as in the instant case, the creditor was paid the entire principal amount  
30 of its loan, all of the accrued interest, pre-petition late charges, and default interest on that  
31 amount. The court in *Dalessio* held that the creditor in that instance should not  
32 automatically be awarded fees, pursuant to § 506(b), for bankruptcy-related appearances,

nor should the oversecured creditor be paid for unnecessary or redundant tasks “or for doing the very thing any creditor, unsecured as well as secured, is entitled to do under the Bankruptcy Code.” *Id.*, at 723-24.

Instead, Northern Trust has the burden of proving the fees sought are reasonable. *In re Coates*, 292 B.R. 894, 900-901 (Bankr. C.D. Ill. 2003) (“When an oversecured creditor seeks to charge the bankruptcy estate with its attorney fees, costs and expenses, the creditor bears the burden to prove the reasonableness thereof.”); *O'Bannon Plaza LLC v. CAB Props., LLC (In re O'Bannon Plaza LLC)*, 523 B.R. 720, 727 (D. Nev. 2014) (“nor should an oversecured creditor be given a blank check to incur fees and costs which will automatically be reimbursed out of its collateral”).

**C. Fees Charged for Objecting to the Plan and Disclosure Statement Should Not Be Recoverable**

Northern Trust has failed to carry its burden under the case law cited above. Many of the time entries are for doing the very thing that any creditor is entitled to do under the Bankruptcy Code, such as object to a disclosure statement or vote on a plan of reorganization. *See Dalessio, supra*. After the Desert Apartments plan and disclosure statement were filed on January 26, 2021 [ECF No. 240], Northern Trust’s attorneys’ invoices for February (\$4,147.20), March (\$14,801.40), April (\$25,160.40), May (\$23,610) and June (\$10,243.80) consist almost entirely of charges for opposing, objecting to, and litigating the disclosure statement and plan. A remarkable aspect of these charges is that Northern Trust’s only claim in the estate at that time was for *residual attorneys fees*, and yet, as the monthly fee amounts suggest, Northern Trust



1 challenged virtually every paper filed by the Trustee or other parties, as Northern Trust  
2 exhausted every effort to attempt to prevent the disclosure statement from being approved  
3 and plan from being confirmed. This all-out effort proved unsuccessful, ultimately, and  
4 the fees for that effort are the sole responsibility of Northern Trust and not the estate.  
5

6 **D. The Vague Billing Entries Fail to Meet Northern Trust's Burden of**  
7 **Showing Reasonableness**

8 The billing entries by Northern Trust's lawyers are minimalist, giving only the  
9 briefest and vaguest descriptions of services. The versions of these billings disclosed to  
10 Mr. Busbin also are heavily redacted. Mr. Busbin's counsel and staff had the labor-  
11 intensive and time-consuming job of figuring out the nature of the services using other  
12 Fennemore billing entries, pleadings, emails, and time entries of other creditors'  
13 counsels, as well as time entries of the trustee and the trustee's counsels. In some  
14 instances, despite diligent efforts, time entries for which Northern Trust demands to be  
15 compensated simply could not be analyzed for reasonableness because they are too  
16 vague. In such instances, Northern Trust has failed to prove reasonableness on the face  
17 of the billings, and its fee demands should be rejected.  
18  
19  
20

21 The job of reviewing the billings didn't need to be that hard and it didn't need to  
22 take that much time, but Northern Trust imposed that burden on Mr. Busbin by  
23 unnecessarily concealing the nature of the services allegedly being rendered. The price  
24 Northern Trust should pay is the waiver of its right to recover those asserted fees.  
25  
26  
27  
28



1           **E.      The Time Entries Show the Charges Are Unreasonable and Beyond**  
2           **the Scope of the Fee Agreement**

3           In other instances, such as the outrageous and redundant amounts billed by two  
4 attorneys for reviewing simple pleadings (a five-paragraph response and a one-sentence  
5 withdrawal of a motion to approve a plan and disclosure statement), the job of Mr.  
6 Busbin's counsel was relatively easy because the time entry could be linked to the  
7 specific review of a specific document. Unfortunately, it was more often the case that the  
8 time entries could not be linked to anything specific. But when an attorney is shown by a  
9 sufficient number of specific examples to be repeatedly overcharging, it is fair to  
10 conclude that the practice of padding bills exists in all of that attorney's billings.  
11 Fortunately, there are sufficient specific instances of gross overcharging to support a  
12 reasonable inference that overcharging is prevalent throughout Northern Trust's  
13 attorneys' billings.  
14

15           In *Dalessio*, the court pointed out that in determining reasonableness "[t]he key  
16 determinant is *whether the creditor incurred expenses and fees that fall within the*  
17 *scope of the fees provision in the agreement*, and took the kinds of actions that similarly  
18 situated creditors might reasonably conclude should be taken, or whether such actions  
19 and fees were so clearly outside the range as to be deemed unreasonable." *Dalessio*, at  
20 723 (emphasis added).  
21

22           As has been pointed out, above, the time entries that are the subject of the instant  
23 motion fall outside the scope of the fees provision in the Notes, and for that reason, the  
24 fees should be considered unreasonable. *Id.*  
25  
26  
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28

IV

Based on the billing entries, the evidence and argument in this Opposition, and the papers and pleadings on file in this proceeding, it is respectfully requested that the Northern Trust's motion for attorneys fees and costs be denied, and that the Court award all other appropriate relief.

LAW OFFICES OF MARK WRAY

MARK WRAY  
Attorney for Creditor  
BRADLEY J. BUSBIN, AS TRUSTEE  
OF THE GONZALES CHARITABLE  
REMAINDER UNITRUST ONE

CERTIFICATE OF SERVICE

1. On November 4, 2021, I served the following documents:

BUSBIN'S OPPOSITION TO APPLICATION FOR APPROVAL AND PAYMENT OF ATTORNEYS FEES FROM SALE PROCEEDS TO SECURED CREDITOR THE NORTHERN TRUST COMPANY

2. I served the above-named document(s) by the following means to the persons as listed below:

a. ECF System: 18-12456-gs Notice will be electronically mailed to:

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TRUSTEE OF DESERT LAND  
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13 I declare under penalty of perjury that the foregoing is true and correct.

14 DATED this 4<sup>th</sup> day of November, 2021.

15 /s/ Karla Mena  
16 KARLA MENA, an employee of  
17 LOWAW OFFICES OF MARK WRAY  
18  
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20  
21  
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